2004

Save Our Canyons, a non-profit Corporation; Herbert and Helga Lloyd, individuals; Karl Bryner, an individual; Mark and Pamela Anderson, individuals; Stephan and Veronique Otto, individuals; Lionel and Janice Mausberg, individuals; and Brian Moench, an individual v. Board of Adjustment of Salt Lake County, Wasatch Pacific, Inc., a corporation, and Terry Diehl, an indiviudal : Reply Brief

Richard D. Burbidge; Stephen B. Mitchell; Jason D. Boren; Burbidge and Mitchell; David E. Yocum; Thomas L. Christensen; District Attorneys; Attorneys for Appellees.
Joseph E. Tesch; Paul R. Poulsen; Tesch Law Offices; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

SAVE OUR CANYONS, a non-profit Corporation; HERBERT & HELGA LLOYD, individuals; KARL BRYNER, an individual; MARK & PAMELA ANDERSON, individuals; STEPHAN & VERONIQUE OTTO, individuals; LIONEL & JANICE MAUSBERG, individuals; and BRIAN MOENCH, an individual, Petitioners/ Appellants, BOARD OF ADJUSTMENT OF SALT LAKE COUNTY, WASATCH PACIFIC, INC., a corporation, and TERRY DIEHL, an individual. Respondents/ Appellees.	**APPELLANT/PETITIONER SAVE OUR CANYONS REPLY TO THE BRIEF OF THE APPELLEES** **APPEAL NO. 20040766-CA**

APPEAL FROM THE AUGUST 12, 2004 ORDER OF THE
THE THIRD DISTRICT COURT, WASATCH COUNTY,
THE HONORABLE TYRONE E. MEDLEY

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The Appellant Save Our Canyons respectfully submits its reply to the brief of appellees.

ARGUMENT IN REPLY

I. SOC HAS DEMONSTRATED THE BOARD'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD

To sum, the Board's decision must be rejected on appeal if it is "arbitrary and capricious" or if the decision is illegal.[1] The decision is considered arbitrary or capricious if it is not supported by substantial evidence. Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. Substantial evidence is lacking and a reasonable mind could not have reached the Board's decision.

As recognized by the trial court, "the board in essence adopted the report and recommendations prepared by the planning staff." (R. at 419:5). By relying upon the unsubstantiated conclusory statements made by the County staff, the Board made no finding of fact regarding the merits of the proposed road in relation to the Salt Lake County Foothills and Canyons Overlay Zone ordinances. In presenting mere conclusory statements to the Board, the County Staff relied upon a "Comparison of the Previous Application #20488 with the Current Application #20962" chart that compared the differences between the two applications, noting a change in the number of requested variances by Wasatch Pacific from fourteen to three. (R. at 416 722-728) The County staff failed to provide specific facts supporting its conclusion that the variances met the statutory requirements, instead the staff merely recited the legal standards for granting

[1] *Id.*

variances. (R. at 416:720-721). Thus, the Boards decision was not supported by substantial evidence.

A. THE FACTS CONSIDERED BY THE BOARD REGARDING THE VARIANCES CANNOT BE MARSHALLED DUE TO THE BOARD'S FAILURE TO ENTER INTO "FINDINGS OF FACT"

Appellees have failed to cite, and SOC has thus far failed to locate, case law supporting Appellees' position that an appellate court is to assume a record supports a board's decision, even when the marshalling of evidence is found to be inadequate. Appellees reference two cases that they claim requires such an assumption.[2] However, neither case referenced by Appellees deals with a decision made by a county board of adjustments, much less any type of quasi-judicial body. The first, *Elm, Inc. v. M.T. Enterprises, Inc.*, 968 P.2d 861, 865-866 (Utah App. 1998), is an employee/employer contract case, the second, *State of Utah v. Teuscher*, 883 P.2d 922, 929-930 (Utah App. 1984), is a criminal case wherein defendant failed to marshal evidence of custody for Miranda purposes on appeal. Both cases are easily distinguished from the present case based upon the vastly different standard of review from a decision of a Board of Adjustment. Unlike the appellate courts in *Elm* and *State v. Teuscher*, this court will review the Board's decision "as if the appeal had come directly from the agency."[3]

In the present case, the Board did not provide its own Findings of Fact, and SOC has stipulated that the facts contained therein are undisputed. Moreover, the trial court included, as part of the Official Record, approximately ten (10) years of records. It is unknown whether these records were actually accessed by the Board in its deliberations.

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[2] *Elm, Inc. v. M.T. Enterprises, Inc.*, 968 P.2d 861, 865-866 (Utah App. 1998); *State of Utah v. Teuscher*, 883 P.2d 922, 929-930 (Utah App. 1984).
[3] *See Patterson* 893, P.2d at 603.

Thus, SOC has no way of knowing which, if any, of these records contains facts that should be the subject of marshalling. As previously noted, over SOC's objection, the trial court ordered that its proceedings were on cross motions for summary judgment, and both Appellants and Appellees proceeded under the Utah Rules of Civil Procedure governing summary judgment.

B. THE BOARD'S DECISION TO GRANT THE VARIANCES IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Board's decision to grant the requested variances is based entirely upon the County Staff Report that lacks any specific findings of fact and makes unsubstantiated conclusions. The County Staff report presented a "Comparison of the Previous Application #20488 with the Current Application #20962" chart that merely compared the differences between the to applications, noting a change in the number of requested variances by Wasatch Pacific from fourteen variances to three. (R. at 416:722-728). This chart comprises the bulk of what Appellees refer to as the "detailed written report" presented by the County to the Board. In fact, of the reports eleven-pages, the three requested variances are discussed in just over one-page, the majority of the remaining pages are devoted to an irrelevant comparison of applications. There is not sufficient evidence in the three-pages to satisfy the substantial evidence standard.

II. THE BOARD OF ADJUSTMENT FAILED TO FOLLOW THE DIRECTIVES OF SECTION 17-27-707 OF THE UTAH CODE ANNOTATED.

Under Utah law, a county board of adjustment may grant variances to the terms of zoning ordinances only if all five of the elements contained in Section 17-27-707 of the Utah Code Annotated are satisfied and are supported by substantial evidence contained in

the record.[4] On June 18, 2003, the Board granted Wasatch Pacific's request for three variances to FCOZ, specifically to FCOZ's Streets/Roads and General Site Access Standards. In reaching their decision to grant the variances, the Board failed to satisfy requirements (1), (4), and (5) of Utah Code Ann. § 17-27-707.

A. WASATCH PACIFIC FAILED TO SATISFY THE "UNREASONABLE HARSDSHIP" REQUIREMENT OF UTAH CODE ANN. § 17-27-707(2)(a)(i).

The statutory requirement, as provided in Utah Code Annotated § 17-27-707(2)(a)(i), states that a Board may only grant a variance if, *inter alia*, "literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance." The "unreasonable hardship" cannot be based upon a "self-imposed" or "economic" hardship.[5]

In their Joint Brief, Appellees state that the Board determined, based upon the County Staff Recommendation and other information presented, that there was no location currently available for an access road to the property other than the access road for which the three variances were sought [6] It was upon this alleged fact that the Board determined the existence of an "unreasonable hardship" adequate to justify the granting of a variance.

In its recommendation report, the County Staff acknowledges that the previous roadway design proposal was reviewed on the basis that it was <u>not</u> the sole means of access to the property. (R. at 416:718). However, the Staff goes on to state only that "[s]ufficient information has now been presented to confirm the applicant's previously-

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[4] *See Patterson*, 893 P.2d at 604
[5] UTAH CODE ANN. § 17-27-707(2)(b)(ii) (2003).
[6] See Appellees Joint Brief at 24.

unsubstantiated assertions that access via the subject property is indeed the only location for the proposed roadway." *Id.* What facts constitute this "sufficient information" is unknown.

At every level of proceedings, SOC has argued that no alternative access points have been adequately pursued by Wasatch Pacific, including the possibility of access across the recorded County road through an adjacent gravel pit. In their Joint Brief, Appellees attempt to place the burden of finding alternative access on SOC, and conclude their argument on the issue by stating, in reference to the graven pit, "...that there was simply no way to construct an access road to the Property that did not cross 30 percent or greater slopes."[7] The fact is, the currently proposed road crosses slopes between 30% and 50% for 1,113 feet (40.5% of its total) and crosses slopes greater than 50% for a distance of 385 feet, all in violation of FCOZ. (R. at 416:717-730). Stating that other available access ways also exceed 30% in some unknown length takes nothing away from the argument that other access ways in fact exist.[8]

The alleged "unreasonable hardship" incurred by Wasatch Pacific has been self-imposed by its failure to adequately seek an alternative access to the property. A position supported by the lack of factual findings and supporting information on the part of the Board and County Staff.

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[7] *Id.* at 26

[8] Salt Lake County never denied it has a recorded roadway. Note also, Wasatch Pacific, Inc. never demanded access across that right of way. How then could use of that accessway have been exhausted?

B. THE VARIANCES SUBSTANTIALLY AFFECT THE GENERAL PLAN OF FCOZ, AND ARE CONTRARY TO THE PUBLIC INTEREST.

The Board did not follow the directive of the Utah Code when it failed to consider whether granting the variances would substantially affect the general plan, or was contrary to public interest. The statutory requirement, as provided in Utah Code Annotated § 17-27-707(2) (a)(iv), states that a Board may only grant a variance if, *inter alia*, "the variance will not substantially affect the general plan and will not be contrary to the public interest."

The public's interest is expressed in FCOZ along with stated purposes for general or master plans.[9] FCOZ, Section 19.72.010, entitled Purposes of Provisions, provides that the standards found in FCOZ are intended to "preserve the visual and aesthetic qualities of the foothills and canyons;" "encourage development designed to reduce risks associated with natural hazards and to provide maximum safety for inhabitants;" "provide adequate and safe vehicular and pedestrian circulation;" "encourage development that fits the natural slope of the land in order to minimize scarring and erosion effects of cutting, filling, and grading related to construction on hillsides, ridgelines, steep slopes, and water quality."

Appellees argue that the Board determined, based upon the Staff Recommendation and other information presented, that allowing uses permitted in the ordinance complies with the general plan, and that public interest is maintained by requiring the access road to meet safety standards, mitigate environmental impacts and

[9] *See Stavola v. Bulkeley*, 134 Conn. 186, 56 A.2d 645 (Conn. 1947); *Miller Cheverolet Inc. v. Willoughby Hills*, 38 Ohio St. 2d 298, 313 NE 2d 400 (Ohio 1974).

minimize negative visual impacts as much as possible.[10] This argument misses the point. It is not the development of a subdivision in the zone that violates the General Plan and intent of FCOZ, it is the road which is absolutely contrary to both that is at issue here. It is the road standing alone that violates FCOZ, whether or not a subdivision is ever built.

C. THE VARIANCES FAIL TO OBSERVE THE SPIRIT OF THE ZONING ORDINANCE.

The Board failed to observe the spirit of the zoning ordinance when it granted variances that eliminate the restrictions the ordinance creates. The statutory requirement, as provided in Utah Code Annotated § 17-27-707(2) (a)(v), states that a Board may only grant a variance if, *inter alia*, "the spirit of the zoning ordinance is observed and substantial justice done." The "spirit of the zoning ordinance" is to promote the "health, safety, and public welfare of residents with an emphasis on "preserv[ing] the natural character of the foothills and canyons."[11] Simply because it works for Los Angeles doesn't mean it works here. In Los Angeles we must conclude that a road can be an architectural icon. Here our ordinances require that the natural character of the foothills be preserved.

III. THE BOARD PARTICIPATED IN UNLAWFUL ACTIONS THAT PROCEDURALLY RENDERED ITS DECISION AS ILLEGAL.

All board of adjustment meetings must comply with the requirements of the Open and Public Meetings Act.[12] In reaching its decision to grant the requested variances, the Board conducted an unlawful "pre-meeting" or closed portion of a public meeting and discussed items material to the issuance of the variance. Additionally, Board members

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[10] See Appellees Joint Brief at 28.
[11] SALT LAKE COUNTY ORDINANCES § 19.72.010
[12] UTAH CODE ANN. § 17-27-702(4)(a) (2004).

purportedly engaged in or permitted, ex-parte contacts outside the public meeting that may have unfairly tainted their decision. (R. at 416:908-914).

A. THE BOARD CONDUCTED AN ILLEGAL CLOSED SESSION WHEREIN THEY DISCUSSED ITEMS MATERIAL TO THE ISSUANCE OF VARIANCES.

Appellees erroneously argue that there is no evidence in the record of a meeting held by the Board prior to the public hearing on June 18, 2003. However, an audio recording of June 18, 1003, entitled "Pre-Meeting" was provided to Save Our Canyons during the lower court proceedings as part of the record. (R. at 1670169, 203-204, 417). Further evidence of this "pre-meeting" is demonstrated by the fact that Appellees relied upon the Affidavit of Jeffery Daugherty, Salt Lake County Development Services Director, to establish that such "pre-meetings" are "normal and customary" prior to public hearing. (R. at 333-335). If these closed pre-meetings are normal and customary, it is all the more reason for this court to act decisively. Otherwise it could be interpreted that this court is condoning these illegal meetings.

Thus, the Board's decision should be rendered void as a violation of the Open Meetings statutes and constitutional due process requirements under Article I of the Utah Constitution and the Fifth and Fourteenth Amendments of the Constitution of the United States.[13]

B. BOARD MEMBERS HAD IMPROPER CONTACT OUTSIDE THE PUBLIC HEARING.

Appellees erroneously argue that the newspaper article demonstrating improper Board member contacts is outside the record. The article in question, "Favoring A

[13] *See Davis County v. Clearfield City*, 756 P.2d 711 (Utah Ct. App. 1988) (overturning a Council decision that was partly based upon evidence obtained at a closed pre-meeting).

Friend", is certainly within the record as it was attached to a letter from the Association of Community Councils Together, urging the Board to undertake appropriate action necessary to insure responsible development in compliance with FCOZ standards in Salt Lake County. (R. 416:85). Moreover, at trial below, SOC'S request to engage in discovery to perfect the point of improper communications was denied by the trial court. (R. 283-287). Thus, leaving the trial court's conclusion that there was no evidence of improper contact somewhat hollow.

Courts have been highly critical of cases involving ex-parte communications between interested parties and decision makers.[14] The inherent unfairness of the hearing as a result of outside contacts amount to a violation of procedural due process requirements, as provided in the Fifth Amendment to the U.S. Constitution and Article I of the Utah Constitution. Accordingly, this Court should hold that Board's decision is void, or amend this case for future discovery on this issue.

V. THE FAILURE TO OBTAIN A VARIANCE FOR DEVIATING FROM THE STANDARD OF PRESERVING THE NATURAL CHARACTER OF THE FOOTHILLS AND CANYONS IS FATAL.

The unholy coziness between the executive branch of Salt Lake County government and Wasatch Pacific, Inc. is revealed by the fact that County Staff has never required Wasatch Pacific to obtain a variance from ordinance 19.72.010 that requires preserving "the natural character of the foothills and canyons."

At the Board and trial court levels, it was argued by Appellees that the three variances requested were not meant to exhaust all the variances that may be necessary

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[14] *See Place v. Board of Adjustment of the Borough of Sadle*, 200 A.2d 601 (N.J. 1964); *Patco v. Federal Labor Relations Board*, 672 F.2d 109 (U.S. App. D.C. 1982); *Endangered Species Committee*, 984 F.2d 1534 (U.S. App. 9th Cir. 1993) (cited in *Wyoming v. U.S.D.A.*, 239 F. Supp. 2nd 1219 (D. Wyo. 2003).

and that the issue of preserving the natural character of the foothills and canyons was irrelevant and, as the trial court held, "Wasatch Pacific was not required to present and the Board was not required to rule on any other variances as a pre-requisite to approving the variances at issue."[15] This 800lb. Gorilla in the room was simply ignored. We now learn that a grading permit for the road has been issued (see Exhibit A attached) without this issue, striking to the very heart of the purpose of FCOZ, ever having been addressed. How could this be? If the legislative branch in the form of the Salt Lake County Council requires preservation of the natural character, may the executive staff in the form of the planning department simply turn a blind eye away from that mandate? What check exists on possible abuse of that discretionary power? SOC believes that its Complaint demanding that this issue be addressed and satisfied raised the issue squarely before the trial court and the trial court erred in its refusal to address the issue and grant the relief requested. If nothing more, this court should remand this issue to the trial court for further proceedings on the issue.

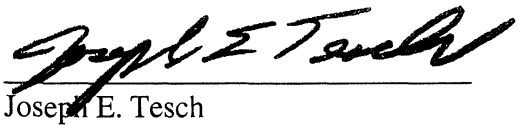
[15] See Findings of Fact, Conclusions of Law and Order Granting Respondents' Motion For Summary Judgment at 9.

CONCLUSION

Based upon the previously submitted Brief of Appellant and the foregoing, this Court should reverse the Board of Adjustment's decision and the trial court's ruling affirming that decision and rule the granted variances void, and award attorney's fees and costs as requested.

DATED this 24th day of February 2005.

TESCH LAW OFFICES, P.C.



Joseph E. Tesch
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I, Lori Nystrom, hereby certify that on the 25 day of February 2005, I delivered the foregoing Appellant Reply Brief to:

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Stephen B. Mitchell
Jason D. Boren
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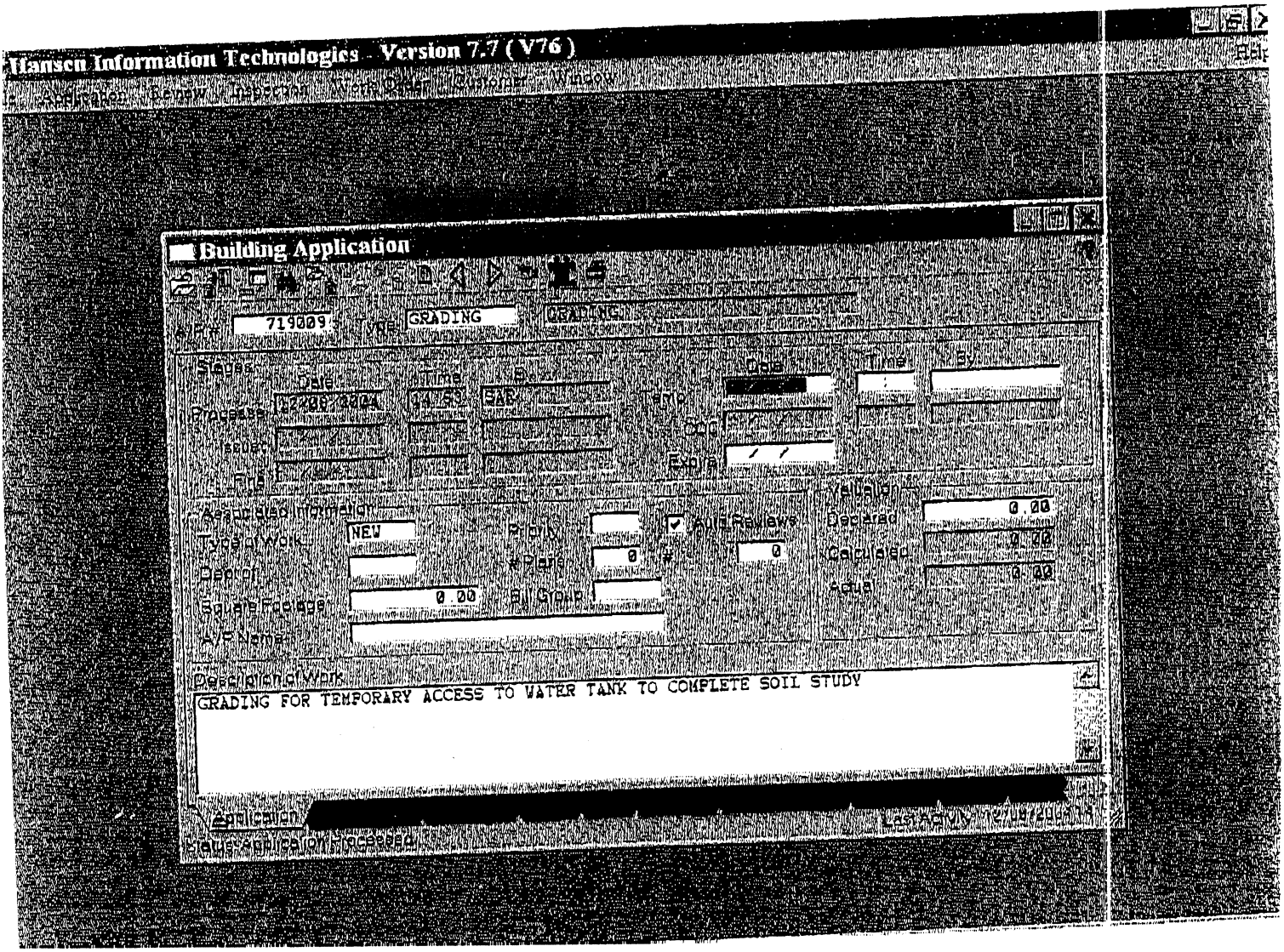
Lori Nystrom

EXHIBIT A


Hansen Information Technologies - Version 7.7 (V76)
Building Application
719009
GRADING
GRADING
Status
Date
Time
By
Code
Time
By
Process
Issued
Fee
Exp'n
Application Information
Valuation
Type of Work
NEW
Entry
Add Reviews
Declared
0.00
Dept Of
Plans
0
#
0
Calculated
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Square Footage
0.00
BV Staff
Actual
0.00
A/E Name
Description of Work
GRADING FOR TEMPORARY ACCESS TO WATER TANK TO COMPLETE SOIL STUDY
Application
Last Activity
Status: Application Accepted

SALT LAKE COUNTY

SALT LAKE COUNTY
PLANNING & DEVELOPMENT SERVICES DIVISION

GRADING PERMIT

APPLICATION #
719009

Issue Date: 08-Dec-2004

DEPARMENT OF PUBLIC WORKS
2001 SOUTH STATE STREET #N3600
SALT LAKE CITY, UT 84190-4050
NSPECTION REQUESTS (801) 468-2163
CODE QUESTIONS. (801) 468-2000
FAX (801) 468-2169
Web Address for inspection: www.pwpds.slco.org/inspect/cfm/requestinspect.cfm

(This application becomes a permit upon required approvals and acceptance of required fees)

roperty Address: 3931 E BIG COTTONWOODCYN RD **Lot / Suite #:**

Land Use Authorization Number: 21530 **Project Name:** PUBLIC UTILITY - WATER TANK
Community Council: Cottonwood Heights **Zone:** FR-1

Land Use Authorized by Date:

PERMIT DETAILS

PLANNING	BUILDING	
	Group/Division:	
	Fire Sprinkler	
	Construction Type	
	Card File	
	Building Area	0 00
	Valuation	
	Occupant Load	

HIS PERMIT IS FOR: GRADING
ype of Work. New Construction

Application Type	Fees
GRADING PLAN REVIEW FEES	49 25
STATE SURCHARGE	2 96
GRADING FEES	296 00
Transaction # 143289 Reciepted by:RJACOBS	348.21

LICENSE CONTRACTOR DECLARATION

I hereby affirm that all work will be performed by contractor licensed under the Construction Traded Licensing Act (58-55 UCA) whose licenses are in full orce and effect

If contractor have not been selected at the time of the application for the permit, the permit is issued only on the condition that currently licensed contractors hall be selected by the applicant, that the applicant shall provide the name(s) and license number(s) of the contractor(s) to Salt Lake County, and shall enter he same name(s) and license number(s) on the permit before they begin their work

This permit shall become null and void If work is not commenced within 180 days, or if work is suspended or abandoned for a period of 180 days or more at any time after the work has commenced.

Commencement or continuation of work shall be verified only by inspection reports from Salt Lake County inspectors All required inspections shall be equested at least one working day before they are to be made Inspections are required before any work is covered Please call if you need further information bout when an inspection is required

I hereby certify that I have read and examined this permit and that the information provided by me is true and correct All provision of Laws and ordinance overning this type of work will be complied with whether specified herein or not The granting of a permit does not presume to give authority to violate or cancel he provision of any other state or local law regulating construction or the performance of construction

Contractor/Agent: HARPER CONTRACTING INC
Address PO BOX 18400
(801)250-0132 x,
Daytime Phone

Print SAMUEL H. DONALDSON Signature Samuel H Donaldson Date Dec 8TH 2004

Approved by S. M Bystedt Date 8 Dec 04

Special Condition: